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Supreme Court of the United States

October, 1942 Term.

No. 1030 65

CRESCENT EXPRESS LINES, INC.,
Plaintiff-Appellant,

AGAINST

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

AND

HUDSON TRANSIT LINES, INC., and MOUNTAIN TRANSIT CORPORATION,
Intervenors-Appellees.

Memorandum in Opposition to Motions to Affirm and in Opposition to Statements Against Jurisdiction.

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Memorandum in Opposition to Motions to Affirm and in Opposition to Statements Against Jurisdiction.

This brief is filed pursuant to Rule 12, paragraph 3 and Rule 7, paragraph 3 of the Rules of this Court.

The defendant-appellee, Interstate Commerce Commission and the Solicitor General have served a Motion to Affirm.

The intervenor-appellee, Hudson Transit Lines has served a Motion to Affirm and a Statement against Jurisdiction.

The intervenor-appellee, Mountain Transit Corporation, has served a Motion to Affirm and a Statement making against the Jurisdiction.

This reply brief on behalf of the Plaintiff-Appellant is in opposition to the aforesaid motions to affirm and statements against the jurisdiction.

Appellant in Opposition to the Motion to Affirm Served by the United States of America and the Interstate Commerce Commission Respectfully States the Following:

These appellees apparently concede the jurisdiction of the Supreme Court and only move to affirm upon the ground that the questions raised by this appeal are not substantial.

On this motion to affirm the issue of lack of substantiality is the sole point to be considered and not the ultimate determination of the questions raised by Appellant.

At no point do these appellees show that there has been a determination of the meaning and construction of §203 (a) subdivision 13, §206 (a), §207 (a) and §208 (a) of the Motor Carrier Act of 1935. This appeal seeks as its principal ground a final interpretation of the meaning of these sections. The lower court in this matter attempted to interpret §§206 (a), 207 (a) and 208 (a) of the Act, and in referring to §308 (a) (which is §208 [a] in the official statutes) said that it must be read "quantitatively". That word is not in the statute but the lower court held that to be the meaning of the proviso in §208 (a).

The position taken by the lower court completely ignores §203 (a) subdivision 13 as to the definition of a motor vehicle. That section and §208 (a) must be read together. The definition of a motor vehicle is all inclusive and does not distinguish between different sizes. In view of the fact that the lower court held that Appellant can operate from various terminals under the restriction to door-to-door service, the right and desirability of using different styles and sizes of equipment becomes clearer. If 30 people come to a terminal and their destination at the other end of the line is at a

terminal, it is economically and commercially desirable to transport these people in one large vehicle with 1 driver instead of taking them in 5 seven-passenger sedans with 5 drivers. The right which Appellant asserts under the statute does not prevent Appellant from using small sedans also. Appellant wants to use all types of motor vehicles in economically operating its business. The intervenors who allegedly use buses also use sedans. The Appellant is only supposed to use sedans regardless of its statutory right to use any kind of motor vehicle, or a combination of various kinds of motor vehicles. The lower court seriously erred when it states that a "carrier cannot have power substantially to modify the quality of his service, however free he may be to 'add' to in amount; and certainly nothing can more directly touch the quality of transportation than the cars in which passengers are carried" (p. 6 of typewritten decision).

Firstly, Appellant concedes that it cannot change the type of service conducted by it or its predecessors on June 1, 1935. But the kind of vehicle used does not change the type of service. It may be an improvement in the quality of service but it does not change the type of service. It is unheard of that a carrier cannot improve his service but must be confined to conditions existing on June 1, 1935. There is nothing in the statute to prohibit such an improvement and §208 (a) expressly prohibits any limitation or restriction upon a carrier from adding to its equipment and facilities as the development of the business and demands of the public shall require. The lower court changed the clear words of the statute and interpolates the word "quantitative" into the statute. Under this construction of §208 (a) a carrier can only add the *precise type of vehicle* that it used on June 1, 1935. The statute is now different than when Congress enacted it. §203 a 13 defines motor vehicles to include all types and the proviso to §208 (a) does not say that a

carrier can add only the same kind of equipment as was used on June 1, 1935 but says that a carrier can add to its *equipment and facilities without any limitation, condition or restriction.*

The lower court was in error in saying that the Commission restricted the Appellant to *cars.* The Commission did no such thing. The Commission realized its lack of power to restrict a carrier to one style of vehicle. Its order of September 2, 1941, merely says:

> " • • • limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats. • • • "

Under this clause it is obvious the Commission did not restrict the Appellant to cars or any particular kind of vehicle. It authorized the use of motor vehicles but limited the transportation of more than 6 passengers at one time. If a truck operator used one ton trucks, or did not carry more than one ton at a time on June 1, 1935, it is lawful for him to now use 10 ton trucks to carry 10 ton loads. But in passenger carrier cases, the Commission freezes the carrier to transporting only 6 passengers at a time because on June 1, 1935 it transported only 6 passengers at one time. It is no change in type of service to use a larger vehicle, or to use small and large vehicles interchangeably as the need arises.

A few practical illustrations will show the error even more clearly. There is an extra charge for passengers who want service to or from a terminal or station. Many people are near origin or destination points, and do not need or want the extra service. They go from or to a station. Such people can be carried in large vehicles carrying more than 6 passengers at a time. They do not get

a different service when they go from a station in New York City to a station in the mountain area, or vice versa in a large vehicle or a small vehicle. A carrier could use a bus seating 45 people, or it could use a vehicle seating 14 passengers, such as the vehicles used to take people to and from airports. If we consider these 14 passenger vehicles for the moment, there is no reason for prohibiting the Appellant from using them, and there is no statutory restriction. On the contrary, there is statutory authorization. Congress meant what it said in the statute which is clear and unambiguous. The lower court and the Commission have created ambiguity where none existed.

This motion to affirm points out the very vice which Appellant asserts here. The motion to affirm (at p. 5—typewritten copy) says:

> "Particular objection is made to the restriction as to the number of passengers to be carried. But that restriction is obviously designed, as the District Court states (Finding of Fact No. 8) to restrict appellant to the use of cars capable of carrying not more than six passengers not including the driver—in short, to seven passenger sedans."

That is an admission of the fact that the Commission indirectly wanted to force Appellant to use sedans. The statute gave no such right but the Commission wanted to get that result indirectly and so tried to impose a restriction limiting the number of passengers to be carried at one time. Naturally, Appellant could use a big bus and that is legal and authorized. It becomes illegal only when more than six people are carried. The business of transporting people is not immoral and the number of passengers carried do not and cannot change a legal act into an illegal act *per se*. We stress this point

with all the force we can. This clearly shows we can use any kind of vehicle large or small and not thereby change the kind of service rendered. The restriction complained of is illegal and without statutory authority, and should be set aside.

These appellees assert that the case of *Royal Cadillac Service, Inc.* v. *United States of America No. 423*, October Term 1942, is authority for the proposition that the restriction is proper. This is wholly without merit and the case has no application. In that case the Appellants there asserted that the Commission had based its decision on the change from sedans to busses. The appellees in that case, who are appellees here also alleged in their motion to affirm in that case the following:

> "Appellants contend that the Commission's decision was based solely upon the fact that Royal on March 28, 1939, changed from the use of sedans to the use of busses * * *. However, a reading of the Commission's report is convincing, and the District Court has concluded, that the applications were denied merely because of the change in the nature of the operations and not because of the change in type of vehicle."

In said *Royal* case, the United States of America in its brief before the District Court stated that the Commission did not ground its conclusion upon the change in the type of vehicles used.

Under these circumstances, it lies with poor grace for the appellees to assert that *Royal's* case is applicable to this one, when they stated in that case that the change in type of vehicles was not the basis for the decision. In any event in the *Royal* case there was no ruling by this Court on the merits or any construction made of the law. This Court merely granted the motion

to affirm and such ruling was made on the evidence which was involved in that case, and which is not the same as in this case. In the case at bar, Appellant is objecting to the form of the certificate issued and contending that the Commission has no right to restrict the Appellant from using any type of equipment, whereas in the *Royal* case, there was a ruling on the evidence that there had been a change in the type of operation without regard to the change in type of vehicles used. That is not involved here and does not in any wise constitute a ruling upon the question of law raised by the Appellant in this case, directly upon the issue of the power of the Commission under the statute to directly or indirectly limit Appellant to a particular type of vehicle, or to restrict the Appellant from carrying any particular number of passengers at any one time. In the present motion to affirm this appellee states there is no difference between the two cases but as stated the *Royal* case was held not to involve a construction of the power of the Commission to restrict the carrier to the use of any particular kind of vehicle because the Commission did not put its decision on that ground. In the present case, the question is squarely presented, and in addition thereto, a construction of the statutes is necessary. There has never been an interpretation of these laws and the construction placed upon them by the lower court is different even from the order complained of, because the lower court held that the Commission properly restricted the Appellant to the use of cars, whereas the Commission made no such restriction. The Commission's order of September 2, 1941, merely limited the Appellant to the number of passengers to be carried at any one time. Under these circumstances there is a substantial question of law which must be determined by this Court so that once and for all the power of the Commission to make restrictions with respect to the size of the vehicle

or the number of passengers to be carried at one time will finally be determined.

As stated in the Statement as to Jurisdiction the questions are substantial because the entire industry needs a determination with some finality as to the meaning of these laws. The lower court's construction is not clear, and in any event is incorrect because it reads into the statute, §208 (a) the word "quantitative" as though a carrier could add quantitatively to its equipment and facilities, but only add the same kind of equipment which was used on June 1, 1935, but the statute itself clearly provides "That no terms, conditions or limitations shall restrict the right of the carrier to add to his or its equipment and facilities * * *."

That provision is clear and gives the carrier the absolute right to add to its equipment and facilities. Such additions are within the contemplation of §203 (a), subdivision 13 so that any kind of motor vehicle could be added.

In the case of *United States v. Carolina Freight Carriers*, 315 U. S. 475, the "freezing" of a carrier to the single pattern that it used on June 1, 1935 was held to be illegal by this Court. Despite that decision, the Commission and the lower court wanted to freeze this carrier to the use of a particular kind of vehicle by making it illegal to carry more than six passengers at any one time.

The lower court in its decision stated that grandfather operators would be free from all regulation and thereby be a favored group if they had the unlimited power to change the quality of their service (p. 6 of typewritten opinion of the lower court) and that it was safe to say Congress did not intend to go so far.

The difficulty with this statement is that grandfather operators are a favored group and merely have to prove that they operated on the grandfather date and continu-

ously since then. The use of a different type of vehicle does not change the type of service nor does it exempt a grandfather operator from the regulation and control as provided for by the Act. The privilege also of adding to equipment is not reserved exclusively to a grandfather operator but that privilege applies to any carrier to whom a certificate may be issued either under the grandfather clause or under §207 (a).

If we look at this matter from any point of view the issue is of importance and is substantial as to the power of the Commission to restrict a carrier to the use of a particular kind of equipment or the limitation of the number of passengers to be carried at one time. It is respectfully submitted that on this motion to affirm the entire case should not be argued on the merits but should await final disposition and oral argument before this Court. Motions of this kind cannot dispose of issues of law prior to a full and fair hearing on the appeal, and the issue presented of the power of the Commission which was never ruled upon by this Court, and never having been interpreted by any court except the lower court in this case, requires that the Court take jurisdiction of this appeal.

There were a number of other objections made in the lower court by Appellant. The first and most important objection to the order of September 2, 1941 is set forth above with respect to the Commission's limitation of the plaintiff to carrying not more than 6 people. The other objections to the order are set forth in the Statement as to Jurisdiction. These appellees (at p. 6 on typewritten copy of motion to affirm) refer to the limitation to special operations, and for the first time state that the use of the term "special operations" was made because Appellant was found not to be a regular route carrier between fixed termini. The difficulty with this argument is that the words "special operations" have no meaning

whatsoever except to apply to charter operators or to authorize carriers to operate in some special operation as a contract carrier as distinguished from a common carrier. The purpose of the proviso in §207 (a) would indicate that Congress intended that the issuance of certificates should particularly specify routes or fixed termini, except where special or charter operations are authorized. Such a provision covers carriers operating on occasional and sporadic trips to different localities, and certainly does not fairly cover common carriers, operating to and from the same territory daily such as the Appellant. There is nothing special about the operations and the right way to describe the situation is as set forth in §206 (a) where the right to operate is either "over the route or routes *or* within the territory for which application is made." In a grandfather case there is a choice of either of those two alternatives, and has nothing to do with the word "special". A carrier who operates within a territory could operate any where in that territory in any way and without regard to the routes used. Section 207 (a) in referring to special operations, apparently considered that special operations were distinctive and were of the type of charter operations. The lower court treated the words, special operations, as having no other meaning except in contrast to regular routes. An interpretation of §207 (a) on this point is needed.

There does not appear to be any discussion made by these appellees with respect to the limitation to door-to-door service or non-scheduled operations and only slight reference is made with respect to the question raised by the Appellant as to the limitation to irregular routes. The ruling of the District Court in Conclusion of Law numbered "1" that the order supported is by the evidence is a conclusion. Such a conclusion must be reviewed by this Court as to whether the evidence in fact supports it. Appellant does not contend that this Court must substitute its judgment for the Commission's deci-

sion, but at least it must ascertain whether the Commission's order is supported by the evidence and whether the Commission acted within the authority conferred by the statute. Regular route as in the case at bar, constitutes the greater portion of the mileage traversed between Wurtsboro and New York. The fact that passengers were picked up and discharged at places of their own choosing along the route did not change the route to irregular. It is no more irregular than the routes of the New York Central Railroad where its trains go part of the way along the route as the need of business requires. Common carriers by motor vehicles pick up and discharge passengers along the route where passengers may signal, and certainly that would not make the route irregular. The point of pick-up or discharge of a passenger does not determine the route or the regularity of the service on such route, and a carrier has the right to arrange the vehicles and the destination of the vehicles according to the needs of its business.

The last ground raised by these appellees is as to Appellant's claim that there were procedural errors. The Commission had made the order of June 20, 1938 which was similar to a previous order of May 7, 1938 which was the same except in an immaterial way. There was no evidence taken by the Commission to support the order of September 2, 1941 and Finding of Fact numbered "6" so states. The absence of any proof on protestant's part to support the order of September 2, 1941 is an indication that the order of September 2, 1941 is incorrect and that the order of June 20, 1938 should be reinstated because it was issued on the evidence then existing, supporting same. Reference to an alleged new hearing in said Finding of Fact is not supported by the record. However, even if a new hearing had been held, protestants failed to give any proof to counteract the evidence already given by plaintiff's predecessors, and

which was the basis for the orders of May 7, 1938 and June 20, 1938.

Conclusion With Respect to the Motion to Affirm by Appellees, Interstate Commerce Commission and United States of America.

The motion to affirm should be denied and jurisdiction noted because of the need for a construction of the statutes as above indicated, which appellant contends have been incorrectly construed and erroneously applied.

Reply With Respect to Motion to Affirm and Statement Against Jurisdiction of Hudson Transit Lines, Inc., Intervening Appellee.

Firstly, the so-called Statement against Jurisdiction contains no allegation to show lack of jurisdiction. The Statement is merely that the questions are not substantial and therefore need no further argument. The said Statement against Jurisdiction is incorrect and is not entitled to any consideration because it is no different than the alleged Motion to Affirm. Nothing is stated to show that the Court lacks jurisdiction in this matter.

The statements contained in this Motion are disputed by the Appellant. Under its alleged statement of fact this appellee states that the Appellant described its service as a "radial, territorial service" whereas in fact the application form showed the regular route over which operations were conducted. The description of the operations of the Appellant as an interstate livery service is absolutely incorrect because individual fares were paid and the vehicles were destined to different points and places in the mountain area, with passengers going to different points in the same vehicle.

This appellee also assigns as the reason that the Commission issued the order of June 20, 1938 as "error or inadvertence". This is not correct because the same order was dated under date of May 7, 1938 and reissued with a new date on June 20, 1938 so that the Commission had approximately six weeks in which it went over the matter and reissued the order.

At pages 4 and 5 (typewritten copy), it tries to give a history of the uncertainty of the Commission with respect to the proper interpretation of §308a of Title 39 U. S. Code (§208a of the Motor Carrier Act) which indicates that there was strong doubt in the Commission as to the proper construction of the law. That doubt has never been determined by the courts until the present case and even then the determination of the lower court is alleged to be in error, so that a final disposition of the issue by this Court is absolutely necessary. It is somewhat frivolous for this appellee to move to affirm on the ground that the issues raised are unsubstantial, and, in its very motion to affirm claiming that the questions are unsubstantial, it describes the extreme doubt that the Commission itself suffered from trying to make an interpretation of the law.

This appellee refers to a hearing in December, 1938 but there is nothing in the record to support that statement or the fact of a hearing held at that time.

The reference made by this appellee to the *Nudelman* case, 28 M. C. C. 91 and *Sullivan County Highway Lines, Inc.*, 21 M. C. C. 717, is without merit because the facts in those matters were different than in the case at bar.

In Reply to Appellee's "First Issue."

Under this phase of this appellee's Motion to Affirm this appellee asserts that the Commission's interpretation of §308 (a) of U. S. Code Title 39 (§208 [a] of the Motor Carrier Act) is correct and the Appellant's inter-

pretation is without any basis. Strenuous effort is made to avoid the fact that the statute, §208a of the Motor Carrier Act is clear and that Appellant's position is correct. As stated above, the Appellant claims that the Commission had not statutory authority to limit the number of passengers to be carried in any one vehicle. The *Nudelman* decisions, 22 M. C. C. 275 and 28 M. C. C. 91, *Dominic Machise* case, 27 M. C. C. 668, *United States* v. *Maher*, 307 U. S. 148 and *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, cited by appellee, are not applicable because they deal with different types of operations and not such as the one in this case. The *Nudelman* decision was based on the peculiar facts then put in evidence. Even if the *Nudelman* case covered this situation, there were two decisions each arriving at a different result. The first decision held that the Commission could not restrict a carrier to any particular type of vehicle and the second merely held that the restriction could be effected by restricting the number of passengers to be carried.

This appellee places stress upon the case of *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. That case supports Appellant's position that the Commission's order "freezes" Appellant into the precise pattern which existed on June 1, 1935 without regard to the proviso contained in §208a of the Motor Carrier Act. It is not a cause for chaos that Appellant asks for its statutory right to expand. It is chaotic for any governmental commission or board to ignore the statutory restriction on its power, and to indirectly try to secure a limitation of a citizen's rights. This was clearly held by this Court in the case of *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488.

Appellee raises the point that competition would be created. That is no reason for restricting a carrier's rights. This Court in the *United States* v. *Carolina Freight Carriers Corp.*, *supra*, at page 481, said:

> "This does not mean that the right to the statutory grant may be withheld or cut down because the Commission disapproves of the competitive conditions which may be created if the application is granted."

Appellant has the right to use any type of vehicle it wishes under the order of September 2, 1941. Appellee at page 11 of its typewritten Motion to Affirm says this is contrary to the fact. Section 203 (a), subdivision 13 of the Motor Carrier Act and the order of September 2, 1941 are so worded as to support Appellant's position. If Appellant's construction is correct, the Commission's order is shown to be illegal and improper as a matter of law. That in itself proves the need for a final ruling by this Court on the subject. Appellant's position regardless of all other matters is sustained by the wording of §208a of the Motor Carrier Act. At page 10 of this appellee's Motion to Affirm, this is practically conceded because this appellee urges that the "intent of the law may not be defeated by rigid adherence to the strict letter." Such "intent of the law" is a matter which requires judicial construction, and such an interpretation of this statute has never been made by this Court. Appellee cites the decisions of the Commission itself in the *Nudelman* and *Sullivan County Highway Lines, Inc.*, cases, *supra,* but that cannot bar Appellant's right to have a final Court determination of the meaning of the statute. In those cases the Commission had decided both ways so that it is as plausible that the first decision in each case is as correct as the second one. The lower court in its opinion in the case at bar said in the next to the last paragraph of the opinion:

> "• • • the whole subject was new and confused, and the Commission itself was divided in opinion."

No matter what view is taken ultimately, the subject is new and confused, and a motion to affirm on the ground that question is not substantial is really an effort to deprive Appellant of its right to be heard on the merits by this Court. There is no merit whatsoever in appellee's argument.

In Reply to the Appellee's "Second Issue".

Under this issue, appellee disputes the Appellant's position that the Commission erred in restricting Appellant to door-to-door, irregular route, non-scheduled and special operations.

The Commission can specify the service to be rendered but it must do so correctly, within the statute and according to the evidence. The Commission in this case made two orders on May 7, 1938 and June 20, 1938, on the evidence, correctly deciding the matter and giving Appellant's predecessors the rights to which they were entitled. But the Commission made the order of September 2, 1941 (See Finding of Fact numbered "6" of lower court herein), without any additional evidence to support it. Appellant is entitled to reinstatement of the order of June 20, 1938 on the merits, but on a motion to affirm, it is facetious for appellee to claim the question is unsubstantial.

The restriction to irregular routes is contrary to Finding of Fact numbered "4". Under §206a of the Motor Carrier Act, a certificate can be issued to a carrier who has operated over regular routes or within a designated teritory. No provision is made for irregular routes. The description of irregular routes is contrary to the order of June 20, 1938 (and the order of May 7, 1938) made by the Commission on the evidence and the new order is not supported by any additional evidence (Finding of Fact No. "6"). The statute, §207a of the Motor Carrier Act, bars the issuance of a certificate over

other than regular routes except where the certificate is to cover special or charter operations. Except for such type of operations the certificate must describe regular routes. In the case of operations referred to in §206a the certificate must cover regular routes or the territory within which operations are to be conducted. Under §208a the Commission must specify the routes, the fixed termini, if any, and where operations are not over regular routes or between fixed termini, the territory within which the carrier is authorized to operate. It should be noted that §206a merely refers to two types of service: (1) regular routes and (2) within a territory. Section 208a refers to three types of service: (1) regular routes, (2) between fixed termini and (3) within a territory. It is apparent that if a carrier should operate between fixed termini, and not over regular routes, it has the choice of going between such fixed termini, in any way that it sees fit. The issues presented require an interpretation of the statutes by this Court because Appellant contends that it operated over regular routes between fixed termini and that the statutes have been erroneously construed and applied in this case.

The alleged restriction to door-to-door service is also contrary to the order of June 20, 1938. The lower court in its opinion and Finding of Fact numbered "3" and Conclusion of Law numbered "3" holds that Appellant did and can operate to fixed stations as door-to-door service. In view of the fact that the lower court ruled that Appellant can operate to fixed stations, it is equivalent to a finding that Appellant did operate on June 1, 1935 between fixed stations or terminals. Under §208 (a) of the Motor Carrier Act the Commission must specify the service over the routes, between fixed termini, if any, or within the territory. In this case, the specification is door-to-door service. Appellant said and says now that that specification is wrong. The lower court held that

Appellant may operate from fixed stations. There is no specification in the order complained of, of such fixed terminals or stations and the omission is error. The lower court in making the said Finding of Fact numbered "3" and Conclusion of Law numbered "3" should have sustained the complaint if only to that extent, and struck out that part of the order of September 2, 1941, at the very least.

The appellee says that the restriction to non-scheduled operations was proper. This provision was also different from the order of June 20, 1938 (and the order of May 7, 1938). There is nothing in the act which provides for schedules. Specification of the service to be rendered must be according to the statutory authority. Schedules or lack of schedules do not affect the kind of service to be rendered. It merely facilitates the convenience of passengers. A business operating on a small scale can function casually and without a schedule. When such a business grows and gets more patronage, more formal methods are needed. No change is effected in the type of operation because better and more efficient methods are employed. In this connection, it should be noted that Appellant's operations are not a livery or taxi service. Vehicles are used for different passengers, each going to different destinations, each purchasing separate tickets, and the vehicle is not being hired for the exclusive use of the passenger as in the case of a taxicab livery service. Passengers are transported in both directions in daily operations. It is a restriction made to impede Appellant's growth, and does not specify the service rendered or to be rendered.

The Commission authorized Appellant to conduct special operations. This was objected to by Appellant. It was contrary to the order of June 20, 1938 and the operations were in fact not special operations. The lower court held that the words meant merely irregular route

operations as distinguished from regular route operations. Appellant in its Statement as to Jurisdiction cites the Commission's own decision in *Peninsula Transit Corp.*, 1 M. C. C. 440, 442; *Red Star Sightseeing Lines, Inc.*, 1 M. C. C. 521, 525; and *John G. Schuster*, M. C. C. 106, showing that the Commission construed the words "special operations" as applicable to charter or sightseeing operations. Section 206a or §208a of the Motor Carrier Act do not refer to special operations and there is now an ambiguous situation as to the meaning of the term "special operations". That term must be construed as to its meaning under §207a of the Motor Carrier Act and as to its correct application to the case at bar. The lower court in its opinion said:

> "We interpret 'special • • • operations' in the proviso to Sec. 307(a), as meaning the same thing as 'operations not over specified routes,' just quoted from Sec. 308(a): *i. e.* operations within a defined territory not upon regular routes, or between fixed termini."

Appellant alleges that the lower court's interpretation is different than the Commission's interpretation of "special operations," and to that extent the complaint should have been sustained at the very least. But the construction is wrong. The Commission has interpreted "special operations" as applying to sightseeing or charter operations, and Appellant's business is a regular daily, two way service carrying different people in each direction. If the Commission's interpretation of "special operations" is correct, its application to the case at bar is incorrect and contrary to the facts. If the lower court is correct in its construction, error is still present because operations of Appellant are not over irregular routes, and the lower court even held that

Appellant was authorized to conduct operations between stations and fixed points. See Finding of Fact numbered "3", Conclusion of Law numbered "3". Section 208a distinctly refers to operations between fixed termini, and therefore "special operations" cannot be held to apply to Appellant's rights according to the Commission's application of that term or the lower court's construction of same.

The reference to the case of *Royal Cadillac Service, Inc.*, 63 Sup. Ct. Rep. 158 is inapplicable. The Supreme Court made no decision on the merits in that case because of the facts involved in that case. The Motions to Affirm were granted there and the Supreme Court did not take jurisdiction because the case had become moot by virtue of the subsequent decision of the Commission rendered on September 9, 1942 before the Supreme Court had passed upon the matter. In any event, in the *Royal* case, the Commission had ruled upon the evidence there presented that there was a change in the type of operation which, of course, is not the situation in this case. Therefore that case is not authority affecting any of the issues presented here. In the case at bar, Appellant is raising the question of the statutory authority of the Commission to make the restrictions and also the fact that the order of June 20, 1938 properly described the right to which Appellant is entitled. In the *Royal* case there was no compliance order such as the order of June 20, 1938.

On this Motion to Affirm under these argumentative circumstances which have never been settled finally in any other case by the courts, it is imperative that this Court should take jurisdiction and make a decision which will determine the meaning of the statutes, the power of the Commission to act thereunder and the correctness of the Commission's ruling in the case at bar as it applied to this Appellant.

In Reply to This Appellee's "Third Issue".

Appellant in the Statement as to Jurisdiction has stated that there are no findings of fact to support the order of September 2, 1941 and that there was no proper procedure in support thereof.

This appellee stated that the issue is unsubstantial and cited the case of *Morgan* v. *United States*, 298 U. S. 468, but that case has no relevancy to the case at bar. Appellant alleges that the Commission after taking the proof made the order of May 7, 1938 and then reissued the same order on June 20, 1938. Such two orders correctly describe Appellant's rights and were based upon the evidence before the Commission. Then, without any further procedure, the Commission issued the order of September 2, 1941 without any additional evidence to support the same. (See Finding of Fact, numbered "6".) The order of June 20, 1938 being supported by the evidence should be reinstated because the order of September 2, 1941 has not been supported by any additional evidence. The two orders were issued by Division 5 and therefore there is no legal jurisdiction for Division 5 issuing a different order on September 2, 1941 without any evidence to support the same. The lower court says in Conclusion of Law numbered "1" that the order of September 2, 1941 was adequately supported by evidence. No matter what view the lower court may have taken of this issue, it also found as a fact (Finding of Fact numbered "6") that there was no additional evidence to support the order of September 2, 1941. Under these circumstances, the Commission, no more than any court, can keep changing its orders on the same evidence because to permit such procedure places a carrier in the uncertain position of never knowing where it stands and what its rights are. It is a form of procedure which should be rejected and is not within the scope of the decision of *Morgan* v. *United States, supra.*

With respect to the lack of findings, the Statement as to Jurisdiction shows numerous cases on that issue. Appellee cites *Visceglia* v. *United States*, 24 Fed. Supp. 355, which is not applicable to the case at bar because there, there was a report made by the Commission whereas in the case at bar there was no report. In fact, the defendant, the United States of America and Interstate Commerce Commission, in their Motion to Affirm on page 7 (typewritten copy) state that the Commission "did not issue the customary formal report in this case". The precise form that findings may take is not material but findings of fact such as required by the cases cited in Appellant's Statement as to Jurisdiction should be made and not having been made, the order of September 2, 1941 should be set aside.

Appellee cites the case of *McArthur* v. *United States*, 315 U. S. 787, as authority but that case has no relevancy to the case at bar and was a ruling upon the facts there involved. The promiscuous citing of cases having no relevancy is a burden to the court and counsel.

Reply With Respect to Motion to Affirm and Statement Against Jurisdiction of Mountain Transit Corporation, Intervening Appellee.

In reply to the Statement making against the Jurisdiction and Motion to Affirm of intervenor-appellee, Mountain Transit Corporation, there is nothing in these moving papers showing in any way that this Court is without jurisdiction to review the appeal. The Statement making against the Jurisdiction is therefore without any foundation. The Motion to Affirm in this case tries to argue that there is no substantial question raised. In an effort to establish a lack of substantiality, this appellee is attempting to review the case on the merits prior to a full hearing before the court. That is not the function of a Motion to Affirm. The questions raised by the Appel-

lant require a construction of the statutes in question as set forth above and the right to a proper construction of those statutes and the correctness of their application to the situation in this case cannot be summarily disposed of. This appellee is interposing a brief not to show lack of substantiality but to avoid, if possible, a full hearing on the merits.

There are many statements contained in this Motion to Affirm which are incorrect and a brief reference and denial of these statements are necessary so that an improper impression may not be created. The form of the application blank as filled out by appellant was such as to give the Appellant the right to authority over the regular routes and the indication of a large irregular circle as the area served by it, is of no consequence and was not indicated to mean territory served, but merely to indicate the points and places served.

A card is allegedly quoted as being an advertisement of Appellant's operations but the material part of the card is omitted. The points and places omitted were the various towns and villages served as regular termini and the card itself is a part of the transcript filed with this Court and reference is hereby made to it. It is immaterial on this motion because it does not meet the issue presented with respect to a proper construction of the statutes and their correct application, which can only be determined after a full hearing and after the Court has already taken jurisdiction.

On page 4 (typewritten copy) of the Motion to Affirm this appellee states that exceptions were filed to the order of June 20, 1938 but it omits the fact that in those exceptions it charged that the proof submitted was false and untrue and that it wanted an opportunity to disprove such proof. Such opposing proof was never given by this appellee or its predecessors (see Finding of Fact numbered "6").

An incomplete resumé of the evidence before the Commission is set forth by appellee in paragraphs numbered 1 to 8, and nothing contained therein in any wise disproves the position of the Appellant that it served places on regular routes, and the fact that 7-passenger cars had been used as set forth above has no bearing. In fact, the Commission itself in this case has not restricted the Appellant to cars but merely restricted them to the number of passengers to be transported at any one time. There is no more reason for restricting the Appellant to transporting not more than 6 passengers than there would be to say that Appellant could not transport more than two passengers because there were occasions probably when 1 or 2 passengers were carried on a particular trip. There were occasions when 7-passenger cars had more than 6 passengers, and that condition has been referred to as overloading, but the limitation to 6 passengers has become the key word used by the Commission.

The resumé therefore is not complete but even as given there is nothing therein contained that changes the Appellant's right to a reinstatement of the order of June 20, 1938.

On page 6 of the Motion to Affirm (typewritten copy) this appellee emphasizes the statement "There never was a dispute as to the facts", and even underlines that statement. In its exceptions before the Commission, this appellee under date of June 6, 1938 filed its exceptions wherein it said "That the petitioners are entitled to and seek the opportunity of rebutting and proving the falsity of the statements and affidavits submitted." There never was any such proof given by the appellee or its predecessors and the identical statement was made in the exceptions of Hudson Transit Lines, Inc.

Finding of Fact numbered "6" is a finding of the lower court in this case that no such proof was ever given, even if we assume that there was a hearing in De-

cember, 1938. The statement, therefore, that there was no dispute as to the facts is contradicted by the exceptions filed by appellee's predecessors.

In any event this appellee in referring to the *Nudelman* and *Sullivan County Highway Lines, Inc.*, cases, shows the extraordinary doubt and uncertainty which existed with respect to the meaning of the statutes and the changes of opinion by the Commission. There never was any court adjudication as to the correctness or incorrectness of the four decisions rendered in the *Nudelman* and *Sullivan County Highway Lines, Inc.*, cases, *supra*. This Appellant is certainly entitled to an adjudication on the merits after a full hearing where there has been such a history of uncertainty and contradiction.

An attempt is made on the bottom of page 8 of the Motion to Affirm (typewritten copy) to claim that 37 days had expired after September 2, 1941 for the filing of exceptions by Appellant although the order itself had granted 30 days to do so. There is no merit to this contention and it was never raised by the Commission, and the reason why it was never raised by the Commission is the fact that the service of the order itself was not made on September 2, 1941 but was made long afterwards and the filing of the exceptions to that order was made within 30 days.

Rule 101 E of the Rules of Practice before the Commission recognizes this practice and the statement made in the Motion to Affirm is irregular and immaterial and might leave the impression that reconsideration was denied by the Commission because of some technical irregularity, which in fact did not exist.

The opening paragraph under the heading "Argument" filed by this appellee contains two statements, one with respect to an alleged second hearing after June 20, 1938 and the other statement "that after October 31, 1940, at which date plaintiff, Crescent Express Lines, Inc., was

substituted for the partnership that legal objections were made to the procedure of the Commission." The Commission had done nothing to determine the exceptions on October 31, 1940 and nothing was done by the plaintiff until after the Commission made its unannounced and unsupported order of September 2, 1941, and then in opposition to that order this Appellant availed itself of all of the procedure allowed to it and raised all of the points as set forth in the complaint and papers herein. No benefit can accrue to this appellee from this statement except to attempt to becloud the issues which require the interpretation of the statutes and an adjudication as to the correctness of their application.

At the bottom of page 13 and top of page 14 of this appellee's Motion, this appellee says:

> "Protestants had never denied that plaintiff's predecessors were entitled to a certificate of convenience and necessity pursuant to Section 206 (a) of the Motor Carrier Act, but always insisted that in accordance with the provisions of Section 208 (a) the certificate issued should specify the service to be rendered, and, in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate and that, in accordance with Section 207 a certificate should be issued herein for special operations as distinguished from regular route and between fixed termini."

That statement is directly contrary to the exceptions itself. The predecessors of this appellee filed exceptions (copies of which are contained in the transcript) in which the most vigorous opposition was made to the order of June 20, 1938 and if there had been a hearing in December, 1938 as claimed, this appellee and its associate,

Hudson Transit Lines, Inc., failed to offer any proof after having demanded such an opportunity. It is unusual for this appellee therefore to allege that it always conceded the right of Appellant to a certificate. The very paragraph which is quoted above from the Motion to Affirm shows that it was willing that a certificate should be issued and that the certificate should specify the service to be rendered and in case of operations not over regular routes and fixed termini, the territory within which the motor carrier should be authorized to operate. That was not the statement contained in the exceptions, but if it were, it recognizes the fact that there was a claim to regular route operations.

Appellee, at page 15 of the Motion to Affirm (typewritten copy) attempts to explain the delay in issuing the order of September 2, 1941 by stating that "obviously, the delay in issuing a new order after the Exceptions to order of June 20, 1938, was occasioned by the pending proceeding as to the question of law involved." This appellee also tries to discuss the *Nudelman* and *Sullivan County Highway Lines, Inc.*, cases, *supra*, but it should be noted that the Commission throughout the discussion was itself uncertain of the meaning of the law, and the uncertainty has never been passed upon by any court prior to this case. In the face of such a condition to even suggest that the questions raised are unsubstantial and not worthy of argument is frivolous.

On page 19 of the Motion to Affirm (typewritten copy) this appellee says that Appellant should not complain of the lack of a subsequent hearing as the protestants would be deprived of such opportunity to present proof. The difficulty, however, is that the protestants are not appealing and have adopted the order of the Commission and the judgment of the court below as being correct. As indicated above, these protestants demanded the opportunity to present proof, but never gave

any proof assuming even that a hearing was held. The statement is again repeated by this appellee that protestants have conceded Appellant's statements were true. This sentence appears at the end of the first paragraph at page 19 of the Motion to Affirm.

> "The protestants, however, have always conceded that applicant's statements at the informal hearings were true statements as to the facts of operation, but have merely differed on the question of law as to the type of service to be described in a certificate to be issued."

Under paragraph 1 of this appellee's exceptions they stated:

> "The petitioners object to the issuance of any certificate being granted to the applicants because of the fact that on June 1st, 1935 and since that day, the applicants have not been engaged in *bona fide* operation over the route applied for."

Appellee under paragraph 4 of the exceptions also stated:

> "That the petitioners (appellee's predecessors) are entitled to and seek the opportunity of rebutting and proving the falsity of the statements and affidavits submitted."

This appellee, and its predecessors, never conceded Appellant's rights to any kind of a certificate. Now, on this Motion to Affirm it concedes the facts but merely differs on the law. Appellant had received the order of June 20, 1938 which was correct and objected to the order of September 2, 1941 because there had been on evidence or procedure to support it. The making of the order of June 20, 1938 was correct, and in the face of the in-

sistent demand of protestants for a hearing for the purpose of their introducing evidence to disprove Appellant's evidence, it was necessary for the Commission to take proof contradicting Appellant's evidence. There was no hearing, or if there had been a hearing, the failure of the protestants to introduce any additional evidence did not change the evidence theretofore given by the Appellant's predecessors, and therefore it was incumbent upon the Commission to allow the order of June 20, 1938 to remain in full force and effect. Instead of that, the Commission changed the order of June 20, 1938 without any additional evidence and now for the first time the protestants claim that they conceded Appellant's right to a certificate and that there was no issue with respect to the facts established. The reason for this peculiar concession is that protestants, who are now appellees, are satisfied with the restricted order, but the Appellant is not satisfied with the said order or the way it was issued. That is one of the issues in this case and affects the property rights of this Appellant in a very substantial manner. The question is substantial and should be reviewed by this Court.

The citation of *United States of America* v. *Maher*, 307 U. S. 148, 152-153, is without merit because there the carrier was not engaged in operation between the points applied for and the statements made by this Court were based on the evidence presented in that case. In the case at bar there was the order of June 20, 1938 based upon the record and which was supported by the evidence.

Conclusion.

It may be stated that with respect to all of the Motions to Affirm that the appellees do not meet the real crux of this case which is the right of the Appellant to secure a proper and final interpretation of §§203 (a),

subdivision 13, 206 (a), 207 (a) and 208 (a) of the Motor Carrier Act of 1935, and its right to have a judicial review of the correct application of those statutes to the case at bar. These issues are of the utmost importance to the entire motor carrier industry and particularly to the Appellant, because of the doubt and uncertainty which has prevailed concerning the meaning of these provisions of the law. The Commission itself spent several years trying to arrive at a result as to the meaning of the statutes but its interpretation of the meaning cannot be accepted as correct where it has changed its decision in the four rulings in the *Sullivan County Highway* case and the *Nudelman* case.

Under these circumstances, the Motions to Affirm are without merit and the questions raised by the Appellant are substantial and this Court should take jurisdiction of the appeal.

The appellees, Mountain Transit Corporation and Hudson Transit Lines, Inc., in their alleged Statement making against the Jurisdiction present no facts or decisions which can show a lack of jurisdiction in this Court in this matter and such two Statements against Jurisdiction of this Court should be overruled and dismissed.

The Motions to Affirm Should Be Denied.

Respectfully submitted,

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